

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Streamlining Deployment of Small Cell)	WT Docket No. 16-421
Infrastructure by Improving Wireless Facilities)	
Siting Policies)	

REPLY COMMENTS OF VERIZON

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I. INTRODUCTION AND SUMMARY.

The United States is poised to be a world leader in 5G technology. Verizon has invested tens of billions of dollars to upgrade its 4G network and is already building several hundred 5G sites as the first step in our plans to spearhead the next generation of wireless service. But ill-fitting and burdensome local requirements and processes threaten to impede the rapid deployment of the small cells that will be the foundation of 5G. For this reason, the Commission’s Public Notice on how to expedite deployment of next generation wireless infrastructure is both timely and necessary, and prompt Commission action is essential.²

The Commission can and should use its statutory authority to relieve the burdens that local ordinances, restrictions on access to municipal and investor-owned utility poles, and historic preservation and tribal reviews impose on wireless carriers’ efforts to deploy wireless broadband technology. As discussed in our opening comments, the Commission should:

¹ The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

² *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd. 13360, 2016 WL 7410755 (2016) (“*Public Notice*”).

- Declare that Section 253 of the Act prohibits states and localities from materially inhibiting or limiting the provision of service, including (1) failure to negotiate timely agreements for access to local rights-of-way and municipally owned poles; (2) non-cost-based or discriminatory fees to access rights-of-way and poles; and (3) actions that erect substantial barriers to making upgrades to existing service, including densifying networks and deploying new technologies;
- Update and clarify the shot clocks that apply to local approvals of small facility requests to (1) adopt a deemed granted remedy for all shot clocks that apply to small wireless facilities; (2) adopt a new 60-day shot clock for small wireless facilities; and (3) clarify that the existing shot clocks apply to all steps of the approval process, including negotiating agreements for access to rights-of-way and municipal poles;
- Declare that the pole attachment statute and rules require access to all poles, including light poles, owned by covered utilities; and
- Place reasonable limits on tribal historic preservation reviews of small wireless facilities.³

The record reflects broad support for the Commission's authority to take these targeted actions and the sound policy undergirding them.

These reply comments respond to arguments made by municipal commenters suggesting that the Commission lacks the legal authority to take the actions Verizon and others proposed in their opening comments. Contrary to these arguments, the Commission has the power to adopt meaningful measures to streamline the deployment of wireless siting technology. In particular:

- The Commission has authority under Section 253 to preempt overly burdensome state and local regulations and requirements pertaining to the provision of wireless telephone service;
- The Commission has authority under Sections 253 and 332(c)(7) to regulate access to public rights-of-way and municipally owned poles when local actions prohibit or effectively prohibit the provision of wireless service (including new 5G services);
- The Commission has authority to reasonably interpret any ambiguous provisions of Section 253(c);

³ See Verizon Opening Comments, at 3 (Mar. 8, 2017).

- The Commission has authority to interpret “fair and reasonable compensation” in Section 253(c) to require cost-based fees;
- The Commission has authority to interpret “fair and reasonable compensation” in Section 253(c) and to determine that cost-based fees do not violate the Fifth Amendment Takings Clause;
- The Commission has substantial flexibility regarding the process by which it interprets the relevant provisions of the Communications Act.

Verizon’s opening comments included specific proposals to enable the United States to maintain its lead in the development and deployment of advanced wireless networks. As described in those comments and below, the Commission possesses the legal authority necessary to implement those proposals.

II. SECTION 253 APPLIES TO THE PROVISION OF WIRELESS SERVICE.

By its plain terms, Section 253(a) applies to all telecommunications services, both wireline and wireless. Section 253(a) states: “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁴ Indeed, the language gives no indication whatsoever that it should apply only to one type or subset of telecommunications service. The language applies to state and local statutes, regulations, and legal requirements that may prohibit or have the effect of prohibiting *telecommunications service*. Some wireless services are unquestionably telecommunications service.⁵ Because

⁴ 47 U.S.C. § 253(a).

⁵ See, e.g., *Public Notice*, 2016 WL 7410755, at *7 (“Sections 253(a) and 332(c)(7) establish that ‘[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity’ to provide personal wireless services or other telecommunications services.”); *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 575 (9th Cir. 2008) (“Soon after the County enacted the Ordinance, Sprint brought this action, alleging that the Ordinance violates 47 U.S.C. § 253(a) because, on its face, it prohibits or

Section 253(a) leaves no doubt that it refers to all telecommunications service, it applies just as surely to wireless telecommunications service as it does to landline service. Unsurprisingly, courts have consistently applied Section 253(a) to state and local ordinances and policies challenged as prohibiting or having the effect of prohibiting the provision of wireless telephone service.⁶

Municipal commenters nonetheless argue that Section 253 does not apply to “cases where it is claimed that a local requirement prohibits or effectively prohibits the provision of wireless services.”⁷ These commenters rely on Section 332(c)(7)(A), which states: “Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”⁸ Because Sections 253 and 332 are in the

has the effect of prohibiting Sprint’s ability to provide *wireless telecommunications services*.”) (emphasis added) (footnote omitted).

⁶ See, e.g., *County of San Diego*, 543 F.3d at 579–80; *Green Mountain Realty Corp. v. Leonard*, No. 09–11559–RWZ, 2011 WL 1898239, at *4 (D. Mass. May 18, 2011), *aff’d in part, vacated in part*, 688 F.3d 40 (1st Cir. 2012); *T-Mobile W. Corp. v. Crow*, No. CV08–1337–PHX–NVW, 2009 WL 5128562, at *12–14 (D. Ariz. Dec. 17, 2009); *Verizon Wireless (VAW) LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325, 1336 (D.N.M. 2007); *Cox Commc’ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002); *Lindenthal v. Town of New Castle*, No. 14/3069, 2015 WL 5444478, at *3 (N.Y. Sup. Ct. June 8, 2015).

⁷ Smart Communities Siting Coalition Comments, at 52 (Mar. 8, 2017); see also City of San Antonio et al. Comments, at 10–14 (Mar. 8, 2017); City and County of San Francisco Comments, at 14–18 (Mar. 8, 2017); Virginia Joint Commenters Comments, at 45–47 (Mar. 8, 2017).

⁸ 47 U.S.C. § 332(c)(7)(A).

same chapter, municipal commenters argue that Section 253 does not apply to providers of wireless services.⁹

This argument misunderstands the different roles played by Sections 253 and 332. Section 332 applies to “decisions regarding the placement, construction, and modification of personal wireless service facilities”¹⁰—that is, to individual siting decisions rendered by state or local governments. Section 332 offers an avenue of relief for these individualized decisions. Section 253, on the other hand, targets for preemption “State or local statute[s] or regulation[s], or other State or local legal requirement[s].”¹¹ As courts have consistently recognized, Section 253 applies to a local government’s statute, regulation, or similar generally applicable legal requirement that governs wireless providers’ attempt to secure access to rights-of-way—such as ordinances that require large separation distances between facilities, impose right-of-way fees, or adopt restrictive equipment size limits.¹² Nothing in Section 332(c)(7)(A), which applies only to “*decisions* regarding the placement, construction, and modification of personal wireless service facilities,”¹³ prevents Section 253 from providing a cause of action against local regulations or

⁹ See Smart Communities Siting Coalition Comments, at 52–53; City of San Antonio et al. Comments, at 10–14.

¹⁰ 47 U.S.C. § 332(c)(7)(A).

¹¹ 47 U.S.C. § 253(a).

¹² See *City of Rio Rancho*, 476 F. Supp. 2d at 1336 (“Section[] 253 ... proscribe[s] ordinances that have the effect of prohibiting the ability to provide telecommunications services.... Section 332(c)(7) provides similar proscriptions on individual zoning decisions. The statutes thus provide parallel proscriptions for ordinances and individual zoning decisions.”); *City of San Marcos*, 204 F. Supp. 2d at 1277 (“Where 47 U.S.C. § 253 provides a cause of action against *local regulations*, section 332 gives a cause of action against *local decisions*.”).

¹³ 47 U.S.C. § 332(c)(7)(A) (emphasis added).

ordinances that prohibit or have the effect of prohibiting the provision of wireless telecommunications service.

The plain language of Sections 253 and 332 supports a distinction between preemption of local ordinances and practices and preemption of individual siting decisions—and allows wireless providers to challenge the former under Section 253. At most, the interplay between these statutes creates an ambiguity that the Commission has authority to resolve. Indeed, the fact that courts have construed Section 332(c)(7)(A) to apply only to individual siting decisions¹⁴ shows that the provision does not so clearly support the municipalities’ interpretation as to require the Commission to adopt it.¹⁵ No argument advanced by the municipal commenters suggests that the statutory language unambiguously requires their interpretation, meaning there is no reason for the Commission to refrain from applying Section 253 to statutes, regulations, or similar generally applicable requirements or practices that effectively prohibit the provision of wireless service.

III. THE COMMISSION HAS THE AUTHORITY UNDER SECTIONS 253 AND 332(C)(7) TO REGULATE STATE AND LOCAL ACTIONS THAT PROHIBIT THE PROVISION OF WIRELESS SERVICE ON PUBLIC RIGHTS-OF-WAY.

The Commission has authority to preempt state and local actions that prohibit access by wireless providers to rights-of-way and municipally owned poles. Sections 253 and 332(c)(7) bar state and local government requirements or actions that prohibit or have the effect of prohibiting the provision of wireless telecommunications services.¹⁶ These sections apply with

¹⁴ See *City of Rio Rancho*, 476 F. Supp. 2d at 1336; *City of San Marcos*, 204 F. Supp. 2d at 1277.

¹⁵ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

¹⁶ See 47 U.S.C. § 253(a) (“No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”); *id.* § 332(c)(7)(B)(i) (“The regulation

full force to local government regulations or decisions regarding rights-of-way that are owned or managed by municipalities, as well as the poles owned or managed by municipalities within those rights-of-way. Municipal commenters' arguments to the contrary are mistaken.

Some commenters suggest that because local governments have property interests in public rights-of-way and poles within those rights-of-way, local governments act in a proprietary—as opposed to regulatory—capacity when granting or denying access to those rights-of-way.¹⁷ They contend that Sections 253 and 332(c)(7) do not preempt non-regulatory decisions of local governments acting in their proprietary capacities, because those decisions allegedly implicate local governments' proprietary decision-making.¹⁸

These commenters misconstrue the nature of municipal interests in management of public rights-of-way. Those interests are not proprietary. In some contexts, courts have applied a canon of construction that presumes that federal statutes do not preempt localities when acting like any other market participant—for example, like a private landowner.¹⁹ For this reason, some courts have interpreted Sections 253 and 332(c)(7) not to apply where a municipality has prevented telecommunications providers from leasing space on municipal property such as a

of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof ... shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”).

¹⁷ See, e.g., City of San Antonio et al. Comments, at 14–15; League of Arizona Cities and Towns et al. Comments, at 2, 24 (Mar. 8, 2017).

¹⁸ See City of San Antonio et al. Comments, at 14–15; Florida Coalition of Local Governments Comments, at 10–11 (Mar. 8, 2017).

¹⁹ See, e.g., *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 231–32 (1993) (“In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.”).

public building.²⁰ In those cases, the courts found that the municipality was acting in a purely proprietary capacity.²¹ Commenters err, however, when they analogize a locality's proprietary interest in a public building to its more limited ownership interests in the rights-of-way it holds in trust for the public.

As the Commission has noted, “[c]ourts have held that municipalities generally do not have compensable ‘ownership’ interests in public rights-of-way, but rather hold the public streets and sidewalks in trust for the public.”²² “It is a widely accepted principle of long standing that ‘[t]he interest [of a city in its streets] is exclusively publici juris, and is, in any aspect, totally unlike property of a private corporation, which is held for its own benefit and used for its private gain or advantage.’”²³

For this reason, municipalities do not possess a proprietary interest in rights-of-way. Many courts “have recognized that the ownership interest municipalities hold in their streets is

²⁰ See, e.g., *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002) (refusing under Section 332(c)(7) to preempt a school district's decision not to place a tower on top of a high school).

²¹ Commenters invoking these precedents have not established that the Commission is prevented from reaching a contrary conclusion in situations in which a locality is acting in a proprietary capacity; that is, commenters have not demonstrated that the canon of construction establishes that Sections 253 and 332(c)(7) unambiguously exempt local action taken in a proprietary capacity.

²² See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, 5160 ¶ 134 (2007) (“*Cable Franchising Report and Order*”), petition for review denied, *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

²³ Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 Dick. L. Rev. 209, 213 (2002) (alterations in original) (quoting *People v. Kerr*, 27 N.Y. 188, 200 (1863)).

‘governmental,’ and not ‘proprietary.’”²⁴ That is because distinct from government buildings, for example, “the municipality does not possess ownership rights as a proprietor of the streets and sidewalks.”²⁵ Thus, even though a municipality can “own” the land beneath a public street, it holds that land in trust for public use, making its decisions regarding that land governmental or regulatory, as opposed to proprietary, in nature.

These general principles apply with full force to Sections 253 and 332(c)(7). The Communications Act preempts state and local government regulation of wireless siting decisions, even though some courts have found (without the Commission’s guidance) that it “does not preempt nonregulatory decisions of a local government entity or instrumentality acting in its proprietary capacity.”²⁶ In order to determine whether a local government’s actions are proprietary or regulatory under the Communications Act, courts look to whether the municipality’s “interactions with the market [are] so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.”²⁷ In making this determination, courts consider “(1) whether ‘the challenged action essentially reflect[s] the entity’s own interest in its efficient procurement of needed goods and services, as

²⁴ *Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 221–22 (1st Cir. 2005) (citing *City & Cty. of Denver v. Qwest Corp.*, 18 P.3d 748, 761 (Colo. 2001) (en banc)); *AT&T Co. v. Vill. of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993); *City of N.Y. v. Bee Line, Inc.*, 284 N.Y.S. 452, 457 (App. Div. 1935), *aff’d*, 3 N.E.2d 202 (N.Y. 1936)); *see also City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 781, 785 (Ohio 1901); *Hodges v. W. Union Tel. Co.*, 18 So. 84, 85 (Miss. 1895).

²⁵ *New Jersey Payphone Ass’n v. Town of W. N.Y.*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), *aff’d*, 299 F.3d 235 (3d Cir. 2002); *see Cable Franchising Report and Order*, 22 FCC Rcd. at 5160 ¶ 134.

²⁶ *Sprint Spectrum L.P.*, 283 F.3d at 421.

²⁷ *Id.*, at 420 (quoting *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)) (internal quotation marks omitted).

measured by comparison with the typical behavior of private parties in similar circumstances,’ and (2) whether ‘the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.’”²⁸

These factors make clear that local governments act in a regulatory or governmental capacity when they take actions that deny wireless providers access to municipally owned or managed rights-of-way and poles, thus bringing these actions within the ambit of Sections 253 and 332(c)(7). When a locality provides a set of requirements that a wireless carrier must follow in order to site its equipment or renders an adverse siting decision, its actions do not resemble those of a private party acting in its own narrow interest, but those of a regulatory body that manages land use decisions on land held in public trust.²⁹ Consequently, where a city’s franchising and permitting decisions denied a payphone company access to the city’s rights-of-way, that decision was regulatory in nature and subject to preemption under Section 253.³⁰ The same is true as to the placement of wireless facilities. Moreover, localities negotiating with wireless providers generally act not on a case-by-case basis, but instead pursuant to master lease or license agreements and local zoning ordinances.³¹ These local requirements put in place for all wireless providers indicate that the localities’ “primary goal [i]s to encourage a general policy

²⁸ *Id.* (alteration in original) (quoting *Cardinal Towing*, 180 F.3d at 693).

²⁹ See *Omnipoint Commc’ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 200 (9th Cir. 2013) (finding a ballot initiative prescribing rules for managing city-owned property to be proprietary in nature, but noting the contrast to rules “promulgated by the local governmental authorities (i.e., the City Council or Planning Commission) that are authorized by law to engage in such legislative land use decision making”).

³⁰ *Coastal Commc’ns Serv., Inc. v. City of N.Y.*, 658 F. Supp. 2d 425, 443 (E.D.N.Y. 2009).

³¹ See Verizon Opening Comments 7–8, 18–19 (Mar. 8, 2017) (noting Verizon’s experience that negotiating with local governments involves generally involves master lease agreements and zoning ordinances).

rather than address a specific proprietary problem.”³² Because local government rules or actions regarding municipally owned or managed rights-of-way or poles within those rights-of-way are regulatory in nature, preemption is proper under Sections 253 and 332(c)(7).

The authorities cited by the commenters do not support their argument that localities act in their proprietary capacity when making siting decisions regarding municipally owned or controlled rights-of-way and poles. *Sprint Spectrum L.P. v. Mills* involved a school district’s decision not to site a cellular tower atop a high school building, which is precisely the kind of action a private landowner might take.³³ And in *Omnipoint Communications, Inc. v. City of Huntington Beach*, the Ninth Circuit found that a municipal ordinance requiring voter approval of any construction on public land was not the type of local land use regulation or adjudicative decision governed by the Communications Act; moreover, as in *Mills*, the land at issue was not a public right-of-way.³⁴ Neither of these cases supports municipal commenters’ arguments that localities act in a proprietary, as opposed to regulatory, capacity when they regulate or take actions regarding public rights-of-way owned or managed for the public trust.

Similarly, the *2014 Infrastructure Order*’s interpretation of Section 6409(a)³⁵ gives no support to the argument that municipalities act in their proprietary capacities when regulating

³² *Sprint Spectrum L.P.*, 283 F.3d at 420 (quoting *Cardinal Towing*, 180 F.3d at 693) (internal quotation marks omitted).

³³ See *City of San Antonio et al. Comments*, at 14–15 & n.36 (citing *Sprint Spectrum L.P.*, 283 F.3d at 421).

³⁴ See *id.* (citing *Omnipoint Commc’ns, Inc.*, 738 F.3d at 200).

³⁵ See 47 U.S.C. § 1455(a) (“Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”).

access to rights-of-way.³⁶ The Commission found that Section 6409(a) did not apply to localities acting as landlords of property they held that was not a right-of-way, because those municipalities were acting in a proprietary capacity.³⁷ The FCC refused, however, to extend that reasoning to publicly owned or managed rights-of-way, as municipal commenters urged.³⁸

Municipal commenters have consequently presented no authority to support their claim that a locality acts in its proprietary capacity when regulating access to public rights-of-way and the poles built within them. Instead, well-established principles and case law make clear that they act in a regulatory or governmental capacity, and their actions that prohibit or have the effect of prohibiting provision of wireless service are subject to preemption under Sections 253 and 332.³⁹

³⁶ See, e.g., Smart Communities Siting Coalition Comments, at 35 & n.45 (citing *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 F.C.C. Rcd. 12865, 12964 ¶ 239 (2014) (“2014 Infrastructure Order”)).

³⁷ See *2014 Infrastructure Order*, 29 F.C.C. Rcd. at 12964 ¶ 239.

³⁸ See *id.* at 12965 ¶ 240.

³⁹ Certain municipal commenters further argue that the Commission should leave interpretation of the term “prohibit or have the effect of prohibiting” to the courts to adjudicate on a case-by-case basis. See Virginia Joint Commenters Comments, at 31–33 (internal quotation marks omitted); City of San Antonio et al. Comments, at 16–17; Smart Communities Siting Coalition Comments, at 66–67. These commenters do not dispute that the Commission has authority to give this term the construction that Verizon has proposed. Moreover, as Verizon explained in its opening comments, the courts have been unable to agree on the proper interpretation of this term, making the Commission’s guidance necessary. See Verizon Opening Comments, at 11–14.

IV. THE COMMISSION HAS AUTHORITY TO INTERPRET SECTION 253(C).

The Commission has the power to interpret ambiguous terms in the Communications Act, including those in Sections 253 and 332.⁴⁰ “The FCC has rulemaking authority to carry out the provisions of [the Communications] Act, which include[s provisions] . . . added by the Telecommunications Act of 1996.”⁴¹ The Supreme Court confirmed this authority with respect to Section 332 in *City of Arlington v. FCC*.⁴² Contrary to arguments of some municipal commenters, nothing in Section 253(d) undercuts the Commission’s authority to interpret the term “fair and reasonable compensation” in Section 253(c).⁴³

Section 253(d) places no limits on the Commission’s interpretive authority. It provides:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.⁴⁴

Noting that this preemption provision references only subsections (a) and (b) of Section 253, some municipal commenters contend that the Commission lacks the authority to interpret the

⁴⁰ *National Cable & Telecommc’ns Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (finding that the Commission has authority to interpret ambiguous terms in the Communications Act).

⁴¹ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (internal quotation marks omitted).

⁴² 133 S. Ct. 1863, 1871–73 (2013) (finding that the Commission has the authority to interpret Section 332).

⁴³ 47 U.S.C. § 253(c).

⁴⁴ *Id.* § 253(d).

meaning of “fair and reasonable compensation” in Section 253(c).⁴⁵ According to these commenters, the statute’s failure to provide for Commission preemption of individual regulations or requirements that violate Section 253(c) “expressly denies the Commission the authority to say anything about the meaning of Section 253(c), even if there is a claim under Section 253(a).”⁴⁶

This argument misunderstands Section 253(d). Section 253(d) imposes an affirmative obligation on the Commission: if the Commission finds a violation of Sections 253(a) or (b), it must take action. But that mandate does not deprive the Commission of its authority to interpret Section 253(c). On the contrary, Section 253(d) constrains the Commission’s discretion in one respect only (requiring the Commission to preempt violations of Section 253(a) or (b) presented to it), thereby leaving unaffected the Commission’s discretion in all other respects, including its discretion to interpret Section 253(c).⁴⁷

Some municipal commenters advance an alternative interpretation: that Section 253(c) claims were meant to be adjudicated in courts of general jurisdiction instead of before the

⁴⁵ See Smart Communities Siting Coalition Comments, at 56; City of New York Comments, at 8 & n.10 (Mar. 8, 2017); Virginia Joint Commenters Comments, at 38–45; City of San Antonio et al. Comments, at 22.

⁴⁶ Virginia Joint Commenters Comments, at 42.

⁴⁷ Some courts have held that the failure to reference Section 253(c) in Section 253(d) reflects the possibility that Section 253(c) serves as a savings clause that does not grant an independent cause of action under the Communications Act. See *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 19–20 (1st Cir. 2006). Because, under this interpretation, a carrier could request that the Commission preempt an ordinance that effectively prohibited the provision of service only under Section 253(a)—and Section 253(c) would operate only to offer the locality an opportunity to defend its scheme as requiring fair and reasonable compensation—there would have been no reason to reference Section 253(c) in Section 253(d). But that logical absence does nothing to suggest that the Commission lacks authority to interpret the terms of Section 253(c).

Commission in a preemption proceeding.⁴⁸ But even if Congress intended for courts to adjudicate all challenges to municipal regulations under Section 253(c), nothing in Section 253(d) suggests that courts must do so absent guidance from the Commission regarding the statutory terms of Section 253(c). Municipal commenters have conflated the Commission’s power to preempt individual state or local ordinances with its authority to interpret ambiguous statutory language. Because Section 253(d) is silent as to the Commission’s authority to interpret Section 253(c), and the Commission generally possesses the authority to interpret ambiguous provisions of the Communications Act, it is squarely within its well-established authority to interpret Section 253(c).

V. THE COMMISSION HAS AUTHORITY TO INTERPRET “FAIR AND REASONABLE COMPENSATION” TO REQUIRE COST-BASED FEES.

Interpreting the term “fair and reasonable compensation” to require cost-based fees is well within the Commission’s authority. The term “fair and reasonable” is ambiguous.⁴⁹ Under *Chevron*, the Commission therefore has latitude to construe this term as long as its interpretation

⁴⁸ See, e.g., City of New York Comments, at 8 & n.10 (citing legislative history to argue that Congress meant to deny the FCC jurisdiction to “immediately to enjoin” local ordinances pursuant to Section 253(c)); see also *Municipality of Guayanilla*, 450 F.3d at 19–20 (second alteration in original) (quoting *Cablevision of Boston, Inc. v. Pub. Improvement Comm’n*, 184 F.3d 88, 99 (1st Cir. 1999)) (“[T]he exclusion of § 253(c) from § 253(d) [which provides for FCC preemption] might reflect Congress’s selection of a forum for § 253(c) claims, limiting jurisdiction to federal or state courts instead of forcing municipalities with limited resources to defend rights-of-way regulations and fee structures before the FCC in Washington, D.C.”).

⁴⁹ The widely divergent interpretations that federal courts have given this term further demonstrates its ambiguity. See *Municipality of Guayanilla*, 450 F.3d at 22 (holding that “fees should be, at the very least, *related* to the actual use of rights of way”); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000) (approving a 4% gross revenue fee); *AT&T Commc’ns of Sw., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998) (striking down 4% gross revenue fee); *New Jersey Payphone Ass’n*, 130 F. Supp. 2d at 638 (striking down auction-based compensation scheme).

is reasonable.⁵⁰ As Verizon explained in its opening comments, interpreting “fair and reasonable compensation” in Section 253(c) to refer to cost-based fees for the use of public rights-of-way and structures within them plainly meets this standard.⁵¹

Certain commenters nonetheless argue that the term “fair and reasonable” must be given a different meaning from the term “just and reasonable” as defined in Sections 224 and 252 of the Communications Act.⁵² Sections 224 and 252 define “just and reasonable” rates for pole attachments and interconnection, transport and termination charges, respectively, as a function of cost.⁵³ The term “fair and reasonable,” the commenters argue, cannot also refer to a cost-based compensation scheme because that would deprive it of a “particular, nonsuperfluous meaning.”⁵⁴

⁵⁰ *Chevron*, 467 U.S. at 844.

⁵¹ Verizon Opening Comments, at 14–17.

⁵² League of Arizona Cities and Towns et al. Comments, at 25–26; Virginia Department of Transportation Comments, at 15–16 (Mar. 8, 2017).

⁵³ See 47 U.S.C. § 224(d)(1) (“[A] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.”); *id.* § 252(d)(1) (providing that just and reasonable rates for interconnection must be “based on the cost ... of providing the interconnection or network element,” “nondiscriminatory,” and “may include a reasonable profit”); *id.* § 252(d)(2) (providing that just and reasonable compensation for transport and termination must “provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier” and “determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls”).

⁵⁴ *Bailey v. United States*, 516 U.S. 137, 146 (1995).

This argument is wrong. Under *Chevron*, the Commission has authority to interpret a statutory provision where Congress has not “directly addressed the precise question at issue.”⁵⁵ There can be no serious argument that Congress’s inclusion of specific definitions of “just and reasonable” in other sections of the Act indicates that it “directly addressed” the meaning of “fair and reasonable” in Section 253(c). Nor do the definitions provided in Sections 224 and 252 render Verizon’s proposed interpretation unreasonable. Sections 224 and 252 explain how to calculate “just and reasonable” cost-based fees in two specific technical and economic contexts. It does not follow that “fair and reasonable,” as used in Section 253(c), must refer to something completely different. If anything, Congress’s clear instruction that “just and reasonable” refers to cost-based fees indicates that it intended to give a similar meaning to the similar term “fair and reasonable” as used in Section 253(c).⁵⁶ Accordingly, nothing about Sections 224 and 252 casts doubt on the Commission’s authority to interpret Section 253(c) or the reasonableness of Verizon’s proposed interpretation.

Nor is Verizon’s proposed interpretation precluded by legislative history, as certain municipal commenters contend. A previous version of Section 253(c) would have prohibited localities from imposing any fee “that distinguishes between or among providers of telecommunications services.”⁵⁷ Congressmen Barton and Stupak proposed an amendment to delete this Section and replace it with language similar to the current law, which was eventually

⁵⁵ *Chevron*, 467 U.S. at 843.

⁵⁶ See *United States v. Patel*, 778 F.3d 607, 613 (7th Cir. 2015) (“To determine the plain meaning of words, we ... consider the construction of similar terms in other statutes”) (citations omitted).

⁵⁷ 141 CONG REC. H8427 (daily ed. Aug. 4, 1995).

adopted by the House.⁵⁸ According to certain commenters, the Commission is precluded from interpreting Section 253(c) to require cost-based fees because that supposedly would revive this “parity” requirement, which they assume Congress chose to omit.⁵⁹

This argument misses the mark. Nothing in the sparse legislative history cited by the commenters suggests that Congress gave a precise meaning to the term “fair and reasonable compensation” in Section 253(c).⁶⁰ Nor does it cast doubt on the reasonableness of Verizon’s proposed construction of that term. The commenters erroneously assume that the Barton-Stupak amendment means that Congress intended to remove the so-called “parity” requirement. The amendment replaced the requirement that fees not “distinguish[] between or among providers of telecommunications services” with the current language, which more broadly limits localities to “fair and reasonable compensation ... on a competitively neutral and nondiscriminatory basis.”⁶¹ The amendment not only preserves the original parity requirement (by establishing a competitive neutrality and nondiscrimination requirement), but goes even further in requiring that local fees be “fair and reasonable.” Far from supporting commenters’ position, this history demonstrates that Section 253(c) prohibits more than just actions that lack parity; it certainly allows the Commission to conclude that the statute also prohibits fees that are not cost-based.

The legislative history also does not support fees designed to raise revenues. Some commenters cite floor statements by Congressman Stupak and others as evidence that Congress

⁵⁸ *Id.* at H8460–61.

⁵⁹ League of Arizona Cities and Towns et al. Comments, at 27–28; Smart Communities Siting Coalition Comments, at 60–61.

⁶⁰ *Chevron*, 467 U.S. at 843.

⁶¹ 141 CONG REC. H8427, 8460–61 (daily ed. Aug. 4, 1995).

intended to permit municipalities to charge revenue-raising rents.⁶² The cited statements, however, do not reject cost-based fees, nor do they espouse any particular measure of compensation. More important, these statements are insufficient to constrain the Commission’s authority to interpret the term “fair and reasonable.”⁶³ Courts have long recognized that congressional floor statements have minimal probative value, and certainly cannot “amend the clear and unambiguous language of a statute.”⁶⁴ Here, the text of the statute effects a broad delegation of authority to the Commission to determine what compensation is “fair and reasonable.” Interpreting this term to require cost-based fees is a reasonable exercise of that delegated authority.

In sum, there can be little doubt that the Commission has authority to interpret “fair and reasonable compensation” to require cost-based fees.⁶⁵ In light of the important public interest in

⁶² See, e.g., City of San Antonio et al. Comments, at 24–25; City of Arlington, Texas Comments, at 9–10 (Mar. 7, 2017).

⁶³ See *National Elec. Mfrs. Ass’n v. U.S. Dep’t of Energy*, 654 F.3d 496, 505 (4th Cir. 2011) (“NEMA has not identified, nor are we aware of, any decision in which we relied on legislative history, standing alone, to *reject* an agency’s interpretation of a statute it administers.”).

⁶⁴ *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002) (“Floor statements from two Senators cannot amend the clear and unambiguous language of a statute.”).

⁶⁵ Some commenters argue that Congress legislated against the background understanding, articulated in *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893) (“*St. Louis I*”), that localities possess authority to charge market-based rents for use of rights-of-way. They contend that this understanding must be imported into the meaning of “fair and reasonable compensation.” See City of San Antonio et al. Comments, at 23–24; National League of Cities et al. Comments, at 21 (Mar. 8, 2017); City of Arlington, Texas Comments, at 5–10. For the reasons discussed below, see *infra* notes 73–79 and accompanying text, their reliance on *St. Louis I* is misplaced.

the expeditious deployment of next-generation mobile technology,⁶⁶ the Commission should exercise its discretion to do so.

VI. INTERPRETING “FAIR AND REASONABLE COMPENSATION” TO REQUIRE COST-BASED FEES DOES NOT VIOLATE THE FIFTH AMENDMENT TAKINGS CLAUSE.

Interpreting Section 253(c) to require cost-based fees does not violate the Takings Clause of the Fifth Amendment, as some commenters suggest.⁶⁷ This argument fails for the simple reason that localities have no relevant property rights to be taken. As discussed above, a locality’s interest in a local right-of-way is not that of a proprietor, but of a trustee holding the property for the benefit of the public.⁶⁸ The control that it exerts “is a function of its powers as trustee, conventionally expressed as the police power to manage the public right-of-way.”⁶⁹ Unlike federal condemnation of municipal buildings, therefore, federal regulation of access to local rights-of-way does not effect a Fifth Amendment “taking.”⁷⁰

⁶⁶ Verizon Opening Comments, at 1–5.

⁶⁷ Virginia Joint Commenters Comments, at 49–52; City of San Antonio et al. Comments at 27–28; Virginia Department of Transportation Comments, at 13–16.

⁶⁸ See *supra*, notes 22–25 and accompanying text.

⁶⁹ *New Jersey Payphone Ass’n*, 130 F. Supp. 2d at 638; see also *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287, 297 (2d Cir. 1986) (“[R]equiring one public utility to give another operative rights over its facilities, subject to an obligation to pay reasonable reimbursement, in order to deliver service to the public ... fits more into the regulatory rather than the taking mode as those terms have traditionally been applied by American courts.”).

⁷⁰ Compare *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (holding that municipality is entitled to just compensation for condemnation of a municipal landfill), with *Municipality of Caguas*, 417 F.3d at 222 (first alteration added) (“[E]ven ‘when the fee of the streets is in the city, in trust for the public,’ it is ‘a mistake to suppose ... [that] the city is constitutionally and necessarily entitled to compensation.’” (quoting *Hodges*, 18 So. at 85)).

The Commission has recognized this distinction. In the *Cable Franchising Report and Order*, the Commission addressed the argument that federal regulation of cable franchising requirements and procedures would violate the Takings Clause. Like the commenters here, the local franchising authorities argued that federal interference with municipal control over rights-of-way constitutes a taking of municipal property without just compensation. The Commission rejected this argument, explaining that “municipalities generally do not have a compensable ‘ownership’ interest in public rights-of-way, but rather hold the public streets and sidewalks in trust for the public.”⁷¹ Accordingly, the Commission concluded that its actions did not constitute a Fifth Amendment taking.⁷² There is no reason for the Commission to depart from this sound reasoning here.

The municipal commenters nonetheless cite *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893) (“*St. Louis I*”), for the proposition that municipalities traditionally possessed the right to “rent” out public rights-of-way at a profit.⁷³ The reliance on *St. Louis I* is misplaced. Although *St. Louis I* suggested that the fees that the city charged to the telegraph company for access to its rights-of-way constituted “rent” for use of municipal property,⁷⁴ that suggestion was at odds with the common law understanding, which was well-established at the time, that localities possess no proprietary interest in rights-of-way.⁷⁵

⁷¹ *Cable Franchising Report and Order*, 22 FCC Rcd. at 5160 ¶ 134.

⁷² *Id.*

⁷³ City of San Antonio et al. Comments, at 23–24; National League of Cities et al. Comments, at 21; City of Arlington, Texas Comments, at 5–10.

⁷⁴ *St. Louis I*, 148 U.S. at 97–100.

⁷⁵ See, e.g., *Kerr*, 27 N.Y. at 212 (“The [municipal] corporation may exercise this trust, or it may have control over the public streets, or the power of regulating their use, but that is not corporate

Indeed, the Supreme Court issued a second opinion on rehearing only two months later that abandoned the “rent” concept.⁷⁶ *St. Louis II* affirmed the city’s right to collect fees from telegraph companies, but located the source of that right in the provision of the city charter authorizing it to “regulate” use of city streets.⁷⁷ Moreover, the Court suggested that such “regulation” is linked to recoupment of costs: “it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, *on condition of contributing something towards the expense it has been to in opening and improving the street.*”⁷⁸ Thus, *St. Louis II* returned to the established understanding that localities exercise regulatory, not proprietary, control over rights-of-way and have no inherent right to profit from such control. Courts have subsequently reaffirmed that understanding many times over.⁷⁹

Even if localities had a right to charge rent for use of their rights-of-way, federal regulation of the price at which they do so would not constitute a taking. “[I]t is ... settled beyond dispute that regulation of rates chargeable from the employment of private property

property, nor has the corporation or any of its corporators a private interest therein, or a right to derive profit therefrom.”).

⁷⁶ *City of St. Louis v. W. Union Tel. Co.*, 149 U.S. 465 (1983) (“*St. Louis II*”).

⁷⁷ *Id.* at 469–70.

⁷⁸ *Id.* at 470 (emphasis added).

⁷⁹ See, e.g., *Village of Arlington Heights*, 620 N.E.2d at 1044 (“Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public.”); *Bee Line, Inc.*, 284 N.Y.S. at 457 (citation omitted) (“The plaintiff has no title to the streets.”); *City of Zanesville*, 59 N.E. at 785 (“A municipal corporation, though holding the fee in its streets, has no private proprietary right or interest in them which entitles it to compensation, under the constitution, when they are subjected to an authorized additional burden of a public nature.”); *Hodges*, 18 So. at 85 (“[N]o question of taxation is here involved, nor any private rights of any ‘landowner.’”).

devoted to public uses is constitutionally permissible.”⁸⁰ So long as the rates set are not “confiscatory,” such regulation may “limit stringently the return recovered on investment, for investors’ interests provide only one of the variables in the constitutional calculus of reasonableness.”⁸¹ In the context of pole attachments under the pre-1996 Pole Attachments Act, the Supreme Court held that a rate providing for the utility’s recovery of fully allocated costs cannot be confiscatory.⁸² Similarly, Verizon’s proposed interpretation of Section 253(c) permits localities to recover the incremental costs associated with the telecommunications provider’s use of the right-of-way. This standard strikes a reasonable balance between the public interest in accessing the right-of-way and the need to compensate a locality for the additional burdens it incurs as a result of such access.

In sum, the Fifth Amendment Takings Clause poses no barrier to the Commission’s adoption of Verizon’s proposed interpretation.⁸³

⁸⁰ *FCC v. Fla. Power Corp.*, 480 U.S. 245, 253 (1987).

⁸¹ *Id.* (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968)) (internal quotation marks omitted).

⁸² *Id.* at 254. *See also Alabama Power Co. v. FCC*, 311 F.3d 1357, 1367–70 (11th Cir. 2002) (holding that compensation for marginal cost of compelled pole access does not violate the Takings Clause absent proof that the pole is at full capacity).

⁸³ Nor does federal regulation of access to municipal rights-of-way violate the Tenth Amendment or principles of federalism, as one commenter suggests. *See City of San Antonio et al. Comments*, at 28. It is well established that Congress has authority under the Commerce Clause to regulate the construction of national telecommunications infrastructure. *See, e.g., Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000). This issue therefore does not implicate the powers reserved to the States under the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 156 (1992) (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States”). Nor does the anti-commandeering doctrine have any application here. That doctrine provides that the “Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” *Printz v. United States*, 521 U.S. 898, 935 (1997). The

VII. THE COMMISSION POSSESSES SUBSTANTIAL FLEXIBILITY WITH REGARD TO THE FORM OF ANY ACTION IT MAY TAKE TO EXPEDITE DEPLOYMENT OF WIRELESS INFRASTRUCTURE.

The Commission has flexibility to determine the appropriate vehicle by which to interpret statutory language. Some municipal commenters contend that in order to interpret Sections 253 and 332, the Commission is required to proceed via notice-and-comment rulemaking.⁸⁴ These arguments are misplaced. The Commission possesses wide latitude to choose the method by which it provides its interpretation of the Communications Act.

“Agencies typically enjoy ‘very broad discretion [in deciding] whether to proceed by way of adjudication or rulemaking.’”⁸⁵ The Commission has the authority under the Administrative Procedure Act (APA) to interpret statutes by engaging in formal rulemaking through notice-and-comment procedures.⁸⁶ The Act also allows agencies to issue “interpretive rules,” which “are issued by an agency to advise the public of the agency’s construction of the statutes and rules

proposed interpretation of Section 253 does neither. It requires no affirmative conduct by State or local authorities whatsoever. It merely prescribes federal limits on their authority to regulate local rights-of-way. Accordingly, Verizon’s proposed interpretation does not violate the anti-commandeering doctrine. *See also Cable Franchising Report and Order*, 22 FCC Rcd. at 5160 ¶ 136 (rejecting argument that the Commission’s regulation of cable franchising violates the Tenth Amendment and the anti-commandeering doctrine).

⁸⁴ *See* Smart Communities Siting Coalition Comments, at 68–69; League of Arizona Cities Comments, at 30–31.

⁸⁵ *City of Arlington v. FCC*, 668 F.3d 229, 240 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013) (alteration in original) (quoting *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001)); *see SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”).

⁸⁶ *See* 5 U.S.C. § 553.

which it administers.”⁸⁷ The requirements for notice and comment do not apply to interpretive rules.⁸⁸ It is also “well-established that agencies can choose to announce new rules through adjudication rather than rulemaking.”⁸⁹ The Commission, like other agencies, is authorized to issue an interpretation or policy judgment through an adjudication, including by issuing a declaratory ruling.⁹⁰

The Commission has the flexibility to choose any of these options to interpret Sections 253 and 332. Accordingly, it is appropriate for the Commission to issue a declaratory ruling regarding the issues raised in the Public Notice.

⁸⁷ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015) (internal quotation marks omitted).

⁸⁸ *See* 5 U.S.C. § 553(b)(A).

⁸⁹ *City of Arlington*, 668 F.3d at 240 (applying this principle to the Commission); *see generally* *NLRB v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267, 294 (1974) (noting that an agency “is not precluded from announcing new principles in an adjudicative proceeding”).

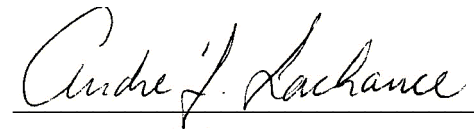
⁹⁰ *See* 47 C.F.R. § 1.2 (“The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

VIII. CONCLUSION

As discussed in Verizon's opening comments and above, the Commission should act quickly to exercise its statutory authority to eliminate barriers to wireless small facility deployment and pave the way for continued leadership in wireless broadband.

Respectfully submitted,

VERIZON

A handwritten signature in cursive script, reading "Andre J. Lachance", positioned above a horizontal line.

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